No. 86-1034

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

Supreme Court, U.S.
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THE COMMONWEALTH OF VIRGINIA

Appellant,

v.

AMERICAN BOOKSELLERS ASSOCIATION, INC.

Appellee.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

BRIEF OF THE NATIONAL LEGAL FOUNDATION AMICUS CURIAE, IN SUPPORT OF APPELLANT

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Appellees

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of April, 1987, three copies of the Brief of Amicus Curiae, and a copy of the Statement Concerning First Class Mailing, were sent by first class mail with postage prepaid to each of the following pursuant to S. Ct. Rule 28.5(b):

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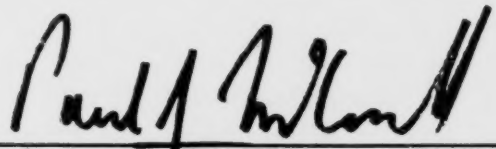
I further certify that service is not required on any other persons, and that all parties required to be served have been served as required under S.Ct. Rule 28.



Paul S. McConnell
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The National Legal Foundation

STATEMENT CONCERNING FIRST CLASS MAILING
(Pursuant to Rules 28.2 and 28.5)

I hereby affirm that the enclosed Brief of Amicus Curiae was deposited in a United States Post Office or mailbox, with first class postage prepaid and properly addressed to the Clerk of this Court, on April 20, 1987, which was within the time allowed for filing; and that I am a member of the Bar of this Court.

Subscribed this 20th day of April, 1987.

The National Legal Foundation

By: _____
Paul S. McConnell

Subscribed and Sworn before me this 20th day of April, 1987.

_____
Notary Public

My Commission Expires: 4/23/89

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INTEREST OF AMICUS CURIAE

The National Legal Foundation was constituted for the purpose of advocacy in support of a proper rendering of the First Amendment. While typically this involves The National Legal Foundation on the side of individual plaintiffs, in this instance, it argues in support of legitimate, indeed compelling State interests and against a trivializing by defendants of the concept of freedom of speech. Futhermore, the Court's disposition of this case will dramatically affect the ability of States to protect the wellbeing of their youth.

The National Legal Foundation is a non-profit corporation organized to defend, restore and preserve constitutional liberties, family rights and other inalienable freedoms.

Counsel of record for Amicus Curiae, Robert K. Skolrood is Executive Director and Paul S. McConnell is Staff Attorney for The National Legal Foundation. Counsel for Amicus Curiae specialize in constitutional litigation and have participated in significant cases relating to First Amendment and other constitutional freedoms.

The National Legal Foundation believes the experience of its attorneys will be of assistance to the court in evaluating this case. Written consent of the parties has been obtained from Counsel of Record.

ISSUE PRESENTED

Whether Virginia Code Section 18.2-391 transgresses U.S. Constitutional restrictions protecting plaintiff's freedom of speech?

SUMMARY OF ARGUMENT

The Commonwealth of Virginia has ably argued on the issues of case or controversy and standing in its brief. Amicus concurs with the Commonwealth that defendants have failed to carry their burden of providing a case or controversy exists. Amicus, however, recognizes the Court may regard a decision on the merits of the First Amendment to be in the best interest of all parties. This brief, then, is directed toward support of the Commonwealth's free speech position.

In upholding the Dictrict Court opinion, the Fourth Circuit Court of Appeals was forced to adopt an unreasonable statutory and constitutional construction. After dismissing the pertinent standing issues, that court determined that the respondent's rights to sell indecent literature, and adult purchasers' right to buy such material without embarrassment satisfied the very high constitutional standard necessary to overcome Virginia's undeniably compelling interest in protecting its youth. This approach required a maximizing of a speculative right, and a minimizing of a long recognized State interest. Such strained interpretation and application of First Amendment principles should be exposed and overruled by this court. Failure to do so will be a signal to booksellers nationwide that all restrictions on display and distribution of indecent material to minors are suspect and ripe for challenge. The effect of such a ruling would be the expansion of pornography's outreach combined with its deadly impact on youthful minds.

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ARGUMENT

I.

APPELLEES HAVE NO ABSOLUTE RIGHT TO SELL INDECENT LITERATURE WITHOUT RESTRICTIONS DESIGNED TO PROTECT MINORS

In order to reach its conclusion that §18.2-391 was facially invalid, the Fourth Circuit recognized a very potent First Amendment interest on the part of the Booksellers. American Booksellers Association, Inc. v. Commonwealth of Virginia, 802 F.2d 691 (1986). That interest was so important that it overcame the straight-forward and compelling

interest of the State in protecting the well-being of its minor citizens (acknowledged by the Fourth Circuit at 694). What is the nature of the Bookseller's interest?

The Fourth Circuit did not assert the Booksellers possessed an independent, First Amendment right to communicate a particular message, rather, theirs was merely a "right to sell" the restricted materials. The Court should recognize that this is not an instance of censorship in which an author is prevented from publication of his books. No author or even publisher is here represented. The proofs the Booksellers adduced before the District Court concerned the economic impact they would suffer. The Fourth Circuit seems to accept the argument that this commercial interest is adequate to sustain the striking down of the Virginia provisions as overbroad.

In Young v. American Mini Theatres, 427 U.S. 50, Powell, J. concurring, acknowledged that the real First Amendment interest in a similar case belonged to the creator and to the potential consumers. The theater in that case, as the bookstore in this one, was nothing more "than a commercial purveyor," n.2, p.331. Said Powell at p. 77,

> Our cases reveal, however, that the central concern of The First Amendment in this area is that there be a free flow from creator to audience of whatever message a film or a book might convey.

In order to assess the impact of a statute on this right, Justice Powell adopted an analysis focusing on the impact on the creators and viewers of the material in question. The impact of the zoning laws which forced a relocation of two adult theatres he deemed "incidental and minimal" with respect to those two interests. While it was much less

"minimal" to the theatres themselves, they were not the communicators or readers.

> They do not profess to convey their own personal messages through the movies they show, so that the only communication involved is that contained in the movies themselves. Id., at p. 331 n.2.

Similarly, in Arcara v. Cloud Books, Inc., 478 U.S. ___, 92 L.Ed.2d 568 (1986) closure of a combined adult bookstore and brothel was upheld by this Court. Despite the extreme economic impact of the closure on the bookseller's asserted rights, the Court reasoned,

> The severity of this burden is dubious at best, and is mitigated by the fact that respondents remain free to sell the same material at another location. At p. 577.

In the instant case, the impact of the statute is far less severe than the impact felt by Cloud Books, Inc. Appellee Booksellers do not have to close or move, merely perform some minimal housekeeping in order to comply with the law.

Moreover, the Booksellers have no particular message. This is not a Christian Science reading room or a church bookstore, but commercial booksellers with commercial interests in conveying books to the public without regard to subject so long as it is legal and it sells. In addition, the statute's scienter requirement saves even the burden of specific review on the part of the Booksellers. Content knowledge preaches any compliance duty under a reasonable reading of the statute, the Fourth Circuit opinion not withstanding.

The Fourth Circuit apparently understood the weakness of resting its decision on the Booksellers' right to sell. That right to engage in commercial activity, emanating from the "liberty" interest protected by the 14th Amendment, if anywhere (See, Meyer v. Nebraska, 262 U.S. 390 (1923)), cannot sustain a facial

overbreadth attack. Overbreadth is uniquely a First Amendment, speech-related concept. As Justice Powell recognized in Young, the theater or bookstore is merely the best situated to assert the author's or public's First Amendment right. Hence, we must consider the strength of the public's right to access. This right alone, among those asserted, could have provided a basis for an overbreadth holding if access was truly restricted. Here, however, it was not.

The entirety of the Court of Appeals' holding rests on a few sentences which convolute the right to access into a right to avoid potential embarrassment. In the Court's words:

> Many adults, for a variety of reasons, would not enter a display area identified as "for adults only." Selling materials in sealed wrappers or from under the counter would unrealistically limit access by adults . . . . Id., at p. 696.

No one has urged the regulation denies

any adult access to the material. Rather the Court's concern focuses on the burden of inconvenience placed on the adults' right. As argued infra, this is not a case where distribution is denied to all in order to protect youths - where the public must bend to the weakest member in the community. Neither is it a case where the State seeks "to burn the house to roast the pig" by prohibiting distribution of material appropriate for adults but inappropriate for young people. Butler v. Michigan, 352 U.S. 380,383 (1957). Both Butler and Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983) involved statutes which absolutely restricted First Amendment access. These cases, relied upon by the District Court's decision (American Booksellers Associates v. Strobel, 617 F.Supp. 699 (D.C., VA, 1985)) involved statutes which prohibited adult access to objectionable materials.

In FCC v. Pacifica Foundation, 438 U.S. 726 (1978) this Court upheld a time restriction on broadcast of "filthy words," a comedic routine deemed inappropriate for young ears. The Court noted adults had access to such speech through many other avenues, and even re-broadcast at a suitable hour for more exclusively adult listeners would not necessarily be restricted. So long as adult access is not cut off, and other means for obtaining the material are available, minimal statutory restraints designed to protect significant State interests should not be overturned.

Here the extent of the burden on the purchasers is one of potential embarrassment of unduly sensitive adults. As with common-law assault and battery standards, so in this area courts should not adapt constitutional standards to the emotionally queasy. Such a lowest

common denominator approach would make constitutionally impossible any restriction in support of the admittedly strong State interest in protecting youth. If states cannot restrict sellers in their display practices, they cannot protect their young citizens from this material. The task of conscientious booksellers in making sure young people do not browse inappropriate matter will be made much easier by display restrictions. Common sense and experience inform us that a 13-year old would be far happier to quietly peruse dirty books unnoticed in a corner of a store than to be forced to ask for them, feign older age, or risk being questioned. Restricting display is of the essence of discharging the State's responsibility. That this may make some edgy adults uneasy is no concern of the law or the Constitution.

II.

THE STATE HAS A COMPELLING INTEREST IN PROTECTING MINORS FROM EXPOSURE TO SEXUALLY EXPLICIT MATERIAL

The State's interest in protecting the welfare of minors is within the scope of its police power. This Court has recognized two interests that justify the State restricting access to materials harmful to minors.

First, parents, who have the primary responsibility to "care and nurture" their child, and prepare their child for future obligations, Prince v. Massachusetts, 321 U.S. 158, 166 (1944), should be "entitled to the support of laws designed to aid in the discharge of that responsibility." Ginsberg v. New York 390 U.S. 629, 639. Hence, since the "parent's claim to authority . . . to direct the rearing of their children is basic in the structure

of our society," Id., the State has a compelling interest in upholding parental authority in order to preserve the fabric of society.

Second, the State has an independent interest in protecting the well-being of its youth. Ginsberg, at p. 640. This Court, in New York v. Ferber, 458 U.S. 747 (1982) declared that "the State's interest in safeguarding the physical and psychological well-being of a minor is 'compelling.'" Id., p. 756-57.

Virginia's display provision serves each of these compelling interests. Although the State interest is perforce "compelling," this Court has recognized mere rationality is sufficient to sustain such a law against a charge of constitutional infirmity. Stating the test in the negative, the Ginsberg Court at 641 ruled that in order to uphold State power to enact the statute, all that needs

to be said is that "it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors." Ginsberg, at p. 641.

It is a matter of common sense, and subject to judicial notice, that minors are exposed to obscene materials through public displays. In a case brought under a New York display law, for example, a store, described as a toy store, carried a display of technicolor cards depicting nudity and sexual conduct. People v. Oshry, 502 N.Y.S. 2d 590, 590-92 (J.Ct. 1986). See also People v. Lou Bern Broadway, Inc., 325 N.Y.S. 2d 806, 808 (Crim.Ct. 1971) (discussing advertisement "clearly visible from the center of Broadway" and containing a large photograph of a nude female), rev'd, 345 N.Y.S. 2d 1012 (Ct.App. 1973).

There is also little doubt that the natural curiosity of minors leads them to

seek access to obscene materials. According to the Hill-Link Minority Report of the Presidential Commission on Obscenity and Pornography, which report was quoted with approval by the Court in Paris Adult Theatre v. Slayton, 413 U.S. 49 (1973): "[T]he heavy users and most highly exposed people to pornography are adolescent females (among women) and adolescent and young adult males (among men)." at 57 n.7, quoting, the Report of the Commission on Obscenity and Pornography 401 (1970).

Although there are ethical constraints on experiments testing the effect of obscene materials on minors, there is considerable support for the conclusion that exposure is in fact harmful. In Ginsberg, the Court cited opinions that exposure to explicit material could disturb the maturation of and otherwise harm children. 390 U.S. at

642 n.10. See also Paris Adult Theatre, 413 U.S. at 58 n.8 (citing opinions that obscene material may have a harmful effect on persons in general); Statement of D. Tilton-Durfee, Final Report, Attorney General's Commission on Pornography 185-86 (1986),

> [O]ne can surmise from the availability of information we have regarding developmental age vulnerabilities of children that those in the early adolescent age group might be the most susceptible and the least capable of managing social and psychological dilemma produced by exposure to pornography.

Some studies done in connection with the 1970 Presidential Commission on Obscenity and Pornography suggest that exposure to pornography at an early age is significantly correlated with early sexual activity and sexual deviance. K. Davis and G. Braucht, Exposure to pornography, character and sexual deviance: A retrospective survey, 7 Technical Report

of the Comm. on Obscenity and Pornography 206-13 (1971); M. Propper, Exposure to Sexually Oriented Materials Among Young Male Prisoners, 9 Technical Report of the Comm. on Obscenity and Pornography 313, 320, 330-31 (1971) (large percentage of a sample of 476 inmates were exposed to visual pornography at early age). There are also numerous reports of children using pornography to harm themselves and others. E.g., Testimony, Final Report, Attorney General's Commission on Pornography 777, 785 (1986) (juvenile boys emulated pornographic pictures in initiating sexual activity with juvenile girls); Id. at 797 (boy used article in Hustler as guide to sexual experiment resulting in his death).

It is well known that pornographic materials are used by adult pedophiles in seducing and conditioning children. According to one article, "In all [sex]

rings, adult pornographic books are used for instruction [of children]." A. Burgess, C. Harman, M. McCausland, P. Powers, Response Patterns in Children in Adolescents Exploited through Sex Rings and Pornography, 141 Am. J. Psychiatry 656,657 (1984).

Although the public display of material obscene for minors cannot conclusively be said to directly lead to involvement in a sex ring, such exposure could serve as a first step in that process. Such a concern is "not irrational," Ginsberg, at 641, and can serve as a basis for regulation of minors' access to explicit material.

In enacting display laws, several State legislatures have expressly relied upon the conclusion that minors are harmed by exposure to obscene materials. For example, the Idaho legislature has said,

> It is hereby declared to be the policy of the legislature to restrain the distribution, promotion or dissemination of obscene material, or of material harmful to minors, or the performance of obscene performances, or performances harmful to minors. It is found that such materials and performances are a contributing factor to crime, to juvenile crime, and also a basic factor in impairing the ethical and moral development of our youth.

Idaho Code §18-1513 (1979). See also Ga. Code Ann. §16-12-101, finding "exhibition" harmful to the general welfare and morals of minors.

The State's purpose in protecting its young people from harmful material is defeated if minors can still thumb through the regulated materials without restraint. This interest extends not only to those minors who intend, upon entering the bookstore, to examine the materials, but also in protecting those minors who have no initial desire to examine the materials, but follow the alluring

invitation of glossy magazine covers and enticing titles.

The legislature could also rationally conclude that the display provision serves the parents' interests in the upbringing of their children. Understandably, many parents do not want their children exposed to sexually explicit material, and this display provision serves to support these parents' interests.

In summary:

1. The only right disturbed by §18.2-391 is that of the easily embarrased "grown up."

2. The State's interest is manifestly "rational."

3. Parents' interests are supported by §18.2-391.

4. Lack of display protection will be harmful to minors.

The Amendment is a Valid Time, Place and Manner Regulation

Even if a significant First Amendment right of adults is involved here, the statutory Amendment is a reasonable manner restriction. Nothing in the provision restricts the time or place of access. Adults are not banned from access to the materials. The Amendment merely places minimal restraints on the manner in which the sexually explicit materials are displayed, and hence available to adult consumers.

A content neutral manner regulation is valid if "designed to serve a substantial governmental interest," and does not unreasonably limit alternative avenues of communication. Renton v. Playtime Theatres, 475 U.S. ___, 89 L.Ed2d 29, 39 (1986). Clark v. Community for Creative Non-Violence, 468 U.S. at 293 (1984).

Of course, some attention must be paid to content solely in order to isolate that for which protection is needed. This does not violate content-neutrality. The plurality in Young understood that prohibitions aimed at protecting juveniles from sexually explicit materials,

> must rest squarely on an appraisal of the content of material otherwise within a constitutionally protected area. Such a line may be drawn on the basis of content without violating the government's paramount obligation of neutrality in its regulation of protected communication. Young, 427 U.S. at 69-70.

Justice Powell, concurring, stated:

> [The] dissent misconceives the issue in this case by insisting that it involves an impermissible time, place, and manner restriction based on the content of expression. It involves nothing of the kind. We have here merely a decision by the city to treat certain movie theaters differently because they have markedly different effects upon their surroundings . . . . Moreover, even if this were a case involving a special governmental response to the content of one type of movie, it is possible that the result would be supported by a line

> of cases recognizing that the government can tailor its reaction to different types of speech according to the degree to which its special and overriding interests are implicated. Id., 82 n.6.

The display provision involves content only to the extent necessary to identify those materials "harmful to minors." Once identified, the statute does not attempt to control the message, but only the manner of display so as to avoid harming children. The object of the law is to protect minors, not restrict speech on the basis of content.

1. The Amendment serves a legitimate compelling State interest.

2. Content is only relevant to achieve that interest.

3. Alternative channels of communication are left open for adults.

III.

THE SUBSTANTIAL OVERBREADTH DOCTRINE IS NO IMPEDIMENT TO THIS STATUTE

In light of the strong compelling State interest in protecting youth from harmful material, and the availability of the materials to adults, §18.2-391 is not substantially overbroad. Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

The rationale behind the development of the overbreadth doctrine is that overlybroad laws operate to chill constitutionally protected speech by intimidating those not "hardy enough to risk criminal prosecution" into refraining from exercising their rights. Dombrowski v. Pfister, 380 U.S. 479, 487 (1965). Arnett v. Kennedy, 416 U.S. 134, 231 (1974) (Marshall, J. dissenting). The booksellers' interest is not in conveying a particular message or viewpoint, but merely an economic interest in sales. The

only possible chilling effect is one the creators of the material or the adult viewers experience. The fact that the statute inconveniences the adults' access to the materials is of no consequence since the statute's sanction is aimed at the booksellers, not the adults. The statute sweeps within its language neither the creators nor viewers of the materials. Because adult access is not denied, and neither author nor purchaser is threatened with sanctions, §18.2-391 does not operate to chill protected speech. Facial invalidation is not justified unless "it is not readily subject to a narrowing construction . . . ." Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975).

> Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute. Broadrick, 413 U.S. at 613.

Furthermore,

> This Court has never held that a statute should be held invalid on its face merely because it is possible to conceive of a single impermissible application. Ferber, 458 U.S. at 772.

If a federal court chooses to interpret a State statute absent State judicial construction, the federal court must adopt a construction that brings the statute into conformance with the Constitution. Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 348, (1935); Screws v. United States, 325 U.S. 91, 98 (1943). Justice Harlan stated,

> But if there were room for two constructions . . . the court must, in deference to the legislature of the State, assume that it did not overlook the provisions of the Constitution . . . . Our duty, therefore, is to adopt that construction which . . . brings the statute into harmony with the provisions of the Constitution.

Grenada County Supervisors v. Brown, 112 U.S. 261, 269 (1884).

The Fourth Circuit's decision has adopted the opposite rule, straining to construe the statute as unconstitutionally overbroad. In discussing various methods of compliance with the statute that would render it constitutional, the Fourth Circuit struck down each suggested alternative as unreasonable. If that approach is upheld, Virginia must abandon any hope of regulating the display of materials harmful to minors. Yet, the Fourth Circuit inconsistently acknowledged that the State has an interest in "shielding minors from sexually explicit materials." 802 F.2d 683, 694. Following its absolutistic holding, no such "shielding" is possible.

In light of the State's compelling interest in protecting minors, the methods of compliance suggested by the State under the statute are reasonable, and this statute may be readily narrowed so as to

withstand an overbreadth challenge.

IV.

CONCLUSION

The Commonwealth of Virginia, by its amendment to §18.2-391 has achieved both protection of its youth and of the free speech rights of its adult population. Read fairly, it fits well within constitutional norms long recognized by this Court. The unreasonable interpretation urged by appellees and followed by the Fourth Circuit, on the other hand, assault the State's duty to protect its minor residents and demeans freedom of speech.

For these reasons, the opinion should be reversed.

Respectfully submitted,

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